

Zane Kane,)	No. CV 23-01969-PHX-KML-ASB
)	
Plaintiff,)	
)	REPORT AND RECOMMENDATION
v.)	
)	
Maricopa Police Department, et al.,)	
)	
Defendants.)	
)	

Recently, the Court issued two Orders to Show Cause as to Plaintiff: first, for Plaintiff's failure to serve Defendants Maricopa Police Department, Louis, Ewald, Benoit, Chavez, Nolasco, and Burns (Doc. 42), and second, for Plaintiff's failure to serve the final party listed in his Complaint, who was described as "Wexford Health medical professional on duty (unnamed female) 7/1/23 Richard Meloche Director" (Doc. 1 at 7). Plaintiff responded to neither Order, and this Report and Recommendation follows.

Plaintiff filed the instant *pro se* civil rights action on September 19, 2023. (Doc. 1.) In his Complaint, Plaintiff named the following defendants in the caption: Maricopa Police Department, Pinal County Sheriffs, and Pinal County Detention Center. (Doc. 1 at 1.) When he listed the individual defendants in the body of his Complaint, however, those entities were not listed. (*See id.* at 2, 7.) Rather, Plaintiff enumerated the following

1 defendants: Maricopa Police Department Officer Louis; Maricopa Police Department
 2 Sergeant Ewald; Maricopa Police Department Corporal Benoit; Maricopa Police
 3 Department Officer Chavez; Maricopa Police Department Nolasco; Maricopa Police
 4 Department Officer Burns; Pinal County Sheriff's Office Sergeant J. Morales; Pinal
 5 County Sheriff's Office Sergeant J. Alcantar; Pinal County Sheriff's Office Detention
 6 Officer D. Austin; Pinal County Sheriff's Office Detention Officer K. Rice; and the
 7 individual described as "Wexford Health medical professional on duty (unnamed female)
 8 4/1/23 Richard Meloche Director." (*Id.*) In the Complaint, Plaintiff included four counts
 9 of alleged violations of his constitutional rights when he was in the custody of the above-
 10 referenced law enforcement agencies. (*Id.* at 3-5, 8.) The Complaint did not specify which
 11 counts were alleged as to which defendants. (*See id.*)

12 In an Order filed September 27, 2023, the previously-assigned District Judge
 13 observed that because Plaintiff was no longer in custody, the Court had no authority to
 14 screen the Complaint under 28 U.S.C. § 1915(e)(2) or 28 U.S.C. § 1915A. (Doc. 4.) In
 15 that Order, the Court ordered Plaintiff "to serve each Defendant or seek a waiver of service
 16 for each Defendant." (*Id.* at 1.) The Court further ordered, "If Plaintiff does not either
 17 obtain a waiver of service of the summons or complete service of the Summons and
 18 Complaint on a Defendant within 90 days of the filing of the Complaint or within 60 days
 19 of the filing of this Order, whichever is later, the action may be dismissed as to each
 20 Defendant not served. Fed. R. Civ. P. 4(m)." (*Id.* at 2.) On December 7, 2023, a declaration
 21 of service as to "MARICOPA POLICE DEPARTMENT c/o Chief of Police Mark
 22 Goodman"¹ was filed. (Doc. 5.) The declaration indicated Chief Goodman was the
 23 individual who accepted service. (*Id.*)

24 Defendant Maricopa Police Department moved to dismiss the claims against it for
 25 lack of personal jurisdiction because Plaintiff did not timely serve it with a summons and

26 ¹ The declaration listed Officers Louis, Edward, Benoit and Chavez (albeit with a
 27 typographical error and reflecting the latter's name as "Chave") behind Chief Goodman's
 28 name. (Doc. 5.) However, the declaration did not indicate that any of those four named
 defendants were served, and as will be discussed *infra*, no proof of service on them was
 filed.

1 complaint. (Doc. 13.) After the Motion was fully briefed, the previously-assigned District
2 Judge considered Rule 4(m) of the Federal Rules of Civil Procedure and found that Plaintiff
3 had “shown he made reasonable efforts to effect service, which supports a good cause
4 finding.” (Doc. 36 at 2-4.) The Court further acknowledged Maricopa Police
5 Department’s argument that Chief Goodman was not an authorized agent to accept service
6 on its behalf, and the Court assumed the Plaintiff had not effected proper service. (*Id.* at
7 4.) Because Plaintiff had shown good cause for his failure to timely and properly serve,
8 the Court denied the Motion and ordered Plaintiff to serve Maricopa Police Department
9 within 30 days from the date the Order was entered. (*Id.* at 4-5.) The Order was dated
10 May 15, 2024 and filed May 16, 2024. (Doc. 36.)

11 In a motion filed July 12, 2024, Plaintiff sought leave to amend his Complaint and
12 30 additional days to serve Defendant Maricopa Police Department “and any other
13 defendants.” (Doc. 38.) To support his request for additional time, Plaintiff asserted that
14 he had encountered “difficulty affording the cost of making additional payments to process
15 servers.” (*Id.* at 2.) The Court noted that service had been outstanding for many months
16 by that point in time, but the Court briefly extended time for service on Maricopa Police
17 Department until August 21, 2024. (*Id.* at 3.) In so doing, the Court observed that the new
18 due date was over two months past the deadline set in the District Judge’s May 2024 Order.
19 (*Id.*) The Court further noted that Plaintiff had failed to identify any other defendants for
20 whom he sought an extension of time to serve and denied the Motion as to defendants other
21 than Maricopa Police Department. (*Id.* at 2-3.)

22 On September 3, 2024, the Court issued an Order to Show Cause as to why the
23 claims against Defendants Maricopa Police Department, Louis, Ewald, Benoit, Chavez,
24 Nolasco, and Burns should not be dismissed for lack of service under Rule 4(m). (Doc.
25 42.) On September 13, 2024, the Court ordered Plaintiff to show cause why his claims
26 against the individual described as “Wexford Health medical professional on duty
27 (unnamed female) 7/1/23 Richard Meloche Director”² should not be similarly dismissed

28 ² A review of the Complaint shows Plaintiff listed that individual as described, but

1 for lack of service. (Doc. 43.) The Court noted that it had previously denied Plaintiff's
 2 motion to compel the Marshals Service to identify that unnamed party, but it had
 3 "explained to Plaintiff the action required to further address that unnamed defendant." (*Id.*
 4 at 1.) The docket in this matter reveals Plaintiff took no further action to serve that
 5 individual, and Plaintiff filed nothing in response to either Order to Show Cause. The time
 6 to respond to the show cause orders has passed.

7 Against that backdrop, undersigned addresses Plaintiff's failure to serve Defendants
 8 Maricopa Police Department, Louis, Ewald, Benoit, Chavez, Nolasco, Burns, and the
 9 individual described as "Wexford Health medical professional on duty (unnamed female)
 10 4/1/23 Richard Meloche Director" in his Complaint. Undersigned notes that this Report
 11 and Recommendation does not address the Pinal County Defendants' pending Motion to
 12 Dismiss. (Doc. 34.) In her May 2024 Order, the previously-assigned District Judge stayed
 13 a ruling on that Motion. (Doc. 36 at 5.) Undersigned notes that Plaintiff was afforded
 14 additional time to respond to the Motion to Dismiss (*see id.*) but failed to do so. In that
 15 Order, the District Judge reminded Plaintiff that failure to respond to the Motion to Dismiss
 16 could result in the Court summarily granting the Motion under LRCiv 7.2(i).

17 **II. ANALYSIS**

18 **A. Applicable Law**

19 In this action, Rule 4 of the Federal Rules of Civil Procedure governs the time limit
 20 for service of a complaint. That Rule provides:

21 If a defendant is not served within 90 days after the complaint is filed, the
 22 court—on motion or on its own after notice to the plaintiff—must dismiss
 23 the action without prejudice against that defendant or order that service be
 24 made within a specified time. But if the plaintiff shows good cause for the
 25 failure, the court must extend the time for service for an appropriate period.

26 Thus, the question before the Court is whether Plaintiff has shown good cause for the
 27 failure to timely serve Defendants Maricopa Police Department, Louis, Ewald, Benoit,
 28 Chavez, Nolasco, Burns, and the unnamed Wexford Health medical professional. If good

with a date of 4/1/23, as opposed to 7/1/23. (Doc. 1 at 7.) Thus, the Court's listing the
 individual with the date of 7/1/23 was a typographical error.

1 cause is shown, time must be extended. *Id.*

2 In the Ninth Circuit, “[a]t a minimum, good cause means excusable neglect.” *In re*
 3 *Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) (brackets in original) (internal quotation marks
 4 and citations omitted). Negligence and ignorance of the Rules is not good cause. *See*
 5 *Townsel v. Contra Costa Cnty., Cal.*, 820 F.2d 319, 320-21 (9th Cir. 1987). When
 6 determining whether a plaintiff has shown good cause, the Court has broad discretion, and
 7 there is no specific test to apply. *In re Sheehan*, 253 F.3d at 513. However, the Court can
 8 consider whether a plaintiff has shown: “(a) the party to be served received actual notice
 9 of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be
 10 severely prejudiced if his complaint were dismissed.” *Id.* at 512 (quoting *Boudette v.*
 11 *Barnette*, 923 F.2d 754, 756 (9th Cir. 1991)). The Court may also consider whether service
 12 was eventually effectuated. *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007). The
 13 Rule 4 provisions should be given a liberal and flexible construction. *See Borzeka v.*
 14 *Heckler*, 739 F.2d 444, 447 (9th Cir. 1984). Public policy favors resolution of matters on
 15 their merits. *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998). However,
 16 the Court’s discretion under Rule 4(m) is not “limitless.” *Efaw*, 473 F.3d at 1041.

17 **B. Analysis**

18 Here, Plaintiff has not responded to either Order to Show Cause. Arguably, the
 19 Court’s inquiry could end there because Plaintiff has made no discernible effort to
 20 demonstrate good cause for his failure to serve Defendants Maricopa Police Department,
 21 Louis, Ewald, Benoit, Chavez, Nolasco, Burns, and the unnamed Wexford Health medical
 22 professional. In order to provide a more complete analysis for the District Judge, however,
 23 undersigned will glean what information is apparent from the record before it. Regarding
 24 the unnamed Wexford Health professional, Plaintiff filed a motion to compel the Marshals
 25 Service to assist him in identifying that person. (Doc. 28.) For reasons explained by the
 26 Court in a previous Order, that Motion was not well-taken. (Doc. 30.) Regarding Marcipoa
 27 Police Department, the previously-assigned District Judge already analyzed Plaintiff’s lack
 28 of service once and *sua sponte* permitted Plaintiff additional time to serve. (Doc. 36.) In
 that Order, the Court laid out the applicable law and what constitutes good cause. (*See id.*)

1 Thus, Plaintiff has been aware of the ongoing requirement to serve and the standard the
2 Court looks to when determining good cause.

3 The only information the Court derives from the record related to Plaintiff's failure
4 to serve after the Court's May 2024 Order comes from Plaintiff's most recent filing, filed
5 July 12, 2024. In that Motion, Plaintiff indicated that he was experiencing financial
6 hardship. (Doc. 38 at 2.) He requested additional time to serve Maricopa Police
7 Department and "remaining defendants." (*Id.* at 1-2.) He did not specify which defendants
8 he believed were "remaining defendants," which was significant given the inconsistency
9 with which he has named defendants, as detailed *supra*. Plaintiff indicated he would need
10 30 additional days to serve. (*Id.* at 2.) After discussing the history of this case, the Court
11 provided him with 14 days. (Doc. 41.) No further activity by Plaintiff appears on the
12 docket.

13 After carefully considering the record and the applicable case law, the Court cannot
14 conclude good cause has been shown. There is no indication from the docket that the
15 individually-named defendants (Louis, Ewald, Benoit, Chavez, Nolasco, Burns, and the
16 unnamed Wexford Health professional) have actual notice of this action. Defendant
17 Maricopa Police Department has actual notice. At this juncture, the matter has been
18 pending over a year and the Court has nothing before it that would indicate service is
19 forthcoming. In short, this matter (as it relates to the defendants listed in the orders to show
20 cause) is no further along than it was when it was filed over a year ago. Delay of this
21 magnitude may result in prejudice to defendants' ability to effectively defend against
22 claims made against them. *See Efaw*, 473 F.3d at 1041 (finding delay, albeit significantly
23 longer than one year, could result in prejudice to defendants). Plaintiff has not responded
24 to either order to show cause to indicate that he will be prejudiced by dismissal. In
25 recommending dismissal for lack of service, undersigned recognizes Plaintiff's stated
26 financial hardship and that public policy favors resolution on the merits. However, Plaintiff
27 has failed to make any effort to show good cause, and the time for service passed months
28 ago. On the record before it, undersigned will recommend to the District Judge that
Defendants Maricopa Police Department, Louis, Ewald, Benoit, Chavez, Nolasco, Burns,

1 and the unnamed Wexford Health medical professional be dismissed from this action
2 without prejudice for lack of service.

3 **III. RECOMMENDATION**

4 For the foregoing reasons, undersigned will recommend dismissal of Defendants
5 Maricopa Police Department, Louis, Ewald, Benoit, Chavez, Nolasco, Burns, and the
6 unnamed Wexford Health medical professional for failure to serve pursuant to Rule 4(m).

7 **IT IS RECOMMENDED** that the Court find Plaintiff has failed to show good
8 cause for failure to serve Defendants Maricopa Police Department, Louis, Ewald, Benoit,
9 Chavez, Nolasco, Burns, and the individual described as “Wexford Health medical
10 professional on duty (unnamed female) 4/1/23 Richard Meloche Director” in the Complaint
11 and enter an order dismissing those defendants from this action without prejudice under
12 Rule 4(m) of the Federal Rules of Civil Procedure.

13 This recommendation is not an order that is immediately appealable to the Ninth
14 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
15 Appellate Procedure, should not be filed until entry of the District Court’s judgment. The
16 parties shall have 14 days from the date of service of a copy of this recommendation within
17 which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Fed. R.
18 Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days within which to file a response
19 to the objections.

20 Failure to timely file objections to the Magistrate Judge’s Report and
21 Recommendation may result in the acceptance of the Report and Recommendation by the
22 District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
23 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the
24 Magistrate Judge will be considered a waiver of a party’s right to appellate review of the
25 findings of fact in an order of judgment entered pursuant to the Magistrate Judge’s
26 recommendation. See Fed. R. Civ. P. 72.

27 Dated this 18th day of October, 2024.



Honorable Alison S. Bachus
United States Magistrate Judge